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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Steven Spiker and Denise Spiker, husband
10 and wife,

11 **Plaintiffs,**

12 v.

13 Sanjivan PLLC, an Arizona professional
14 limited liability company dba Buckeye
15 Medical Clinic; Karen Padilla; John Doe
16 Padilla; Wal-Mart Stores Incorporated, a
17 Delaware corporation; Wal-Mart
18 Transportation LLC, a foreign LLC; Wal-
19 Mart Associates Incorporated, a Delaware
20 corporation; Stephen Kracht, D.O.; and
21 EScreen Incorporated, a Delaware
22 corporation,

23 **Defendants.**

No. CV-13-00334-PHX-GMS

ORDER

24 All Defendants move to dismiss Plaintiffs' Second Amended Complaint for failure
25 to state a claim pursuant to Rule 12(b)(6). (Docs. 19, 20, 21.) For the reasons specified
26 below, the Motion of Defendant Wal-Mart is granted in part and denied in part, the
27 Motion of Defendants BMC and Padilla is denied, and the Motion of Defendants eScreen
28 and Dr. Kracht is granted in part and denied in part.¹

¹ The request for oral argument by Defendants BMC and Padilla is denied because the Parties have had an adequate opportunity to discuss the law and evidence, and oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Grp. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

BACKGROUND

This case arises out of an employee drug test that revealed the existence of banned substances and led to the termination of the employee. Plaintiff Steven Spiker was employed as a truck driver for Defendant Wal-Mart for approximately seven years.² (Doc. 14, Sec. Am. Compl. ¶ 31.) Truck drivers are subject to the Federal Omnibus Transportation Employee Testing Act (the “FOTETA”) and the implementing Department of Transportation (“DOT”) regulations. 49 U.S.C. §§ 45101, *et seq.* Defendant eScreen, a Third-Party Administrator (“TPA”), provided bundled drug testing services to Wal-Mart. (Doc. 14 ¶ 8.) eScreen handled the selection, hiring, training, and/or supervision of collection sites and medical review officers (“MROs”). (*Id.* ¶¶ 10–11.)

On September 2, 2011, Mr. Spiker was directed by Wal-Mart to submit to a random DOT drug test at a collection site, Defendant Buckeye Medical Clinic (“BMC”). (*Id.* ¶ 34.) Mr. Spiker reported to BMC and provided a urine specimen to BMC’s employee, Defendant Karen Padilla. (*Id.* ¶¶ 35, 37–38.) At the time, the Complaint alleges that Padilla was not credentialed or trained pursuant to the DOT regulations. (*Id.* ¶ 38.) Padilla affixed a tamper-evident seal on Mr. Spiker’s specimen bottle after Mr. Spiker initialed it. (*Id.* ¶ 37.) Padilla prepared the specimen, completed a Custody and Control Form (“CCF”) that Mr. Spiker certified, and sent the specimen and the CCF to a laboratory. Padilla’s handling of Mr. Spiker’s specimens led to them being contaminated or mistakenly identified. (*Id.* ¶ 69.) At the laboratory, the specimen tested positive for banned substances. (*Id.* ¶ 43; Doc. 20-1, Ex. 1.) Defendant Stephen Kracht, D.O., the MRO, reviewed the CCF and the laboratory’s findings but did not discover any flaws therein. (Doc. 14 ¶ 39.)

Upon receiving notice of the positive drug test report, Mr. Spiker complained

² The Court takes as true the allegations contained in the Spikers’ Second Amended Complaint at this stage of the litigation. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996).

1 about the report and the drug testing process to Defendants but they did not invalidate the
2 report. (*Id.* ¶ 45.) As a result of the report, Wal-Mart terminated Mr. Spiker's
3 employment. (*Id.* ¶ 46.) Further, Mr. Spiker's commercial driving record on file with the
4 DOT was impacted negatively by the drug test. (*Id.* ¶ 48.) He is now subject to additional
5 restrictions and requirements from the DOT. (*Id.* ¶ 50.) Prior to his termination, Spiker
6 earned an annual salary of \$92,500 with additional health and retirement benefits. (*Id.* ¶
7 31.) Following his termination, Mr. Spiker was unemployed for approximately eight
8 weeks. (*Id.* ¶ 51.) Although he found new employment, it was at a lower salary of
9 \$45,000 and a lower level of health and retirement benefits. (*Id.* ¶ 52.)

10 Mr. Spiker and his wife, Denise Spiker, brought an action against Defendants in
11 the Maricopa County Superior Court on April 6, 2012. (Doc. 1-3.) The Spikers had
12 named Clinical Reference Laboratory as a Defendant in the original state court complaint
13 but removed the party in their amended complaint. (Docs. 1-1, 1-3.) Dr. Kracht removed
14 the action to this Court on February 14, 2013, and all Defendants stipulated to the
15 removal. (Doc. 1.) On April 2, the Spikers filed a Second Amended Complaint (the
16 "SAC") alleging claims of negligence against all Defendants and negligent training and
17 supervision against Wal-Mart, eScreen, and BMC. (Doc. 14 ¶¶ 58-80.) All Defendants
18 now move to dismiss the SAC.

19 DISCUSSION

20 I. MEET AND CONFER

21 The Court ordered the Parties to "meet and confer prior to the filing of a motion to
22 dismiss to determine whether it can be avoided." (Doc. 3 at 1.) The Court further ordered
23 that "motions to dismiss must contain a certification of conferral indicating that the
24 parties have conferred to determine whether an amendment could cure a deficient
25 pleading, and have been unable to agree that the pleading is curable by a permissible
26 amendment. . . . Motions to dismiss that do not contain the required certification are
27 subject to be stricken on the Court's motion." (*Id.* at 1-2.)

28 Defendants BMC, Padilla, eScreen, and Dr. Kracht did not attach a certification of

1 conferral to their Motions. After the Spikers alerted the Court to that deficiency in their
2 Response, Defendants attached a joint certification to their Reply briefs. (Doc. 36-1, Ex.
3 10.) In this circumstance, and because the requirement is new, the Court will review the
4 adequacy of the certification.

5 In the certification, Defendants contend that they participated in “lengthy and
6 numerous discussions with Plaintiffs’ counsel with respect to deficiencies in Plaintiffs’
7 [First Amended Complaint] prior to filing of their Motions to Dismiss.” (*Id.* at 2.)
8 Defendants further contend that all parties participated in a conference call on March 2,
9 2013, to discuss each party’s respective issues with the First Amended Complaint and
10 whether any deficiencies could be cured through amendment. The Spikers argue,
11 however, that at the time of the March 2 conference, Wal-Mart was the only party that
12 had filed a Motion to Dismiss and only issues that pertained to that Motion were
13 discussed at the conference; none of the issues presented in Defendants’ other Motions
14 were raised at that time.

15 In addition to the March 2 conference, Defendants state that eScreen and Dr.
16 Kracht have had “numerous other phone calls and exchanged multiple emails with
17 Plaintiffs’ counsel on other deficiencies with Plaintiffs’ [First Amended Complaint].”
18 (*Id.*) At the end of this exchange, “the parties agreed to disagree as to some other issues
19 of law with the understanding that each party would be filing motions to dismiss after
20 [the SAC] was filed.” (*Id.*)

21 Although the Parties dispute what issues were raised in the March 2 conference, it
22 is not disputed that Defendants have conferred with the Spikers regarding deficiencies in
23 the First Amended Complaint and that the Spikers have once amended their Complaint in
24 response to those conversations. Defendants may not have informally raised every issue
25 pertinent to the Complaint that is raised in their Motions but the obligation to meet and
26 confer does not include an obligation to assist the Spikers in carefully drafting a second
27 amended complaint. The Court finds that the Defendants complied with their obligation
28 to meet and confer with the Spikers prior to filing their Motions and will consider the

merits of Defendants' arguments.

II. LEGAL STANDARD

Rule 12(b)(6) is designed to "test the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While "a complaint need not contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

When analyzing a complaint for the failure to state a claim under Rule 12(b)(6), "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

III. EXHAUSTION

The general rule is that parties must exhaust prescribed administrative remedies before seeking relief from the federal courts. *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992) (internal citations omitted); *Minor v. Cochise Cnty.*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980) ("It is a well recognized principle of law that a party must exhaust

1 his administrative remedies before appealing to the courts.”). The rule “is a salutary one
2 allowing agencies to exercise their expertise, to correct their own errors, and to provide
3 relief that may be both swifter and more satisfactory than relief available through more
4 formal litigation.” *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 878 (9th Cir. 2011) *cert.*
5 *denied*, 132 S. Ct. 1540, 182 L. Ed. 2d 161 (2012). “Notwithstanding these substantial
6 institutional interests, federal courts are vested with a virtually unflagging obligation to
7 exercise the jurisdiction given them. *McCarthy*, 503 U.S. at 146 (internal quotation marks
8 and citation omitted). Therefore, exhaustion may not be required “in some circumstances
9 even where administrative and judicial interests would counsel otherwise.” *Id.* “In
10 deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may
11 look beyond the pleadings and decide disputed issues of fact.” *Wyatt v. Terhune*, 315
12 F.3d 1108, 1119–20 (9th Cir. 2003).

13 Wal-Mart contends that Mr. Spiker did not exhaust his administrative remedies
14 before seeking relief from this Court. One of these remedies is to complain to the Chief
15 Safety Officer of the Federal Motor Carrier Safety Administration (the “FMCSA”) that a
16 “substantial violation” of the FOTETA and the DOT regulations is occurring or has
17 occurred within the preceding 60 days. *See* 49 C.F.R. § 386.12(a). A substantial violation
18 is defined as “one which could reasonably lead to, or has resulted in, serious personal
19 injury or death.” *Id.* The Officer has the discretion to initiate proceedings and investigate
20 the complaint if it meets that standard. *Id.* § 386.12(b). The other administrative remedy
21 is that an employee may request a test of the split specimen within 72 hours of being
22 notified by the MRO that the employee has a verified positive drug test. *Id.* § 40.171(a).

23 The Supreme Court has recognized that the interests of the individual may weigh
24 heavily against requiring administrative exhaustion before filing suit if “an administrative
25 remedy may be inadequate because of some doubt as to whether the agency was
26 empowered to grant effective relief.” *McCarthy*, 503 U.S. at 147. Mr. Spiker was not able
27 to obtain relief from the FMCSA by filing a complaint pursuant to Section 386.12. Wal-
28 Mart’s alleged negligence did not amount to a “substantial violation” or relate to a “fatal

1 flaw” under Section 40.199 triggering cancellation of Mr. Spiker’s drug test. The remedy
2 would not redress a complaint of negligence below that level. Further, even if Mr. Spiker
3 had requested a split specimen test from the MRO it would not have accounted for the
4 alleged flaws in his drug test that supposedly led to a positive result: the mislabeling or
5 belated sealing of his specimens. Had Mr. Spiker pursued administrative remedies before
6 filing suit rather than afterwards, they would have proven futile.

7 The inadequacy of the remedies to redress the alleged conduct are further
8 evidenced by an FMCSA letter sent to Mr. Spiker in response to his July 8, 2012 request
9 for an administrative hearing. An FMCA Associate Administrator replied on August 7
10 that “the FMCSA does not offer administrative hearings to challenge positive drug test
11 results.” (Doc. 29-1, Ex. A.) More importantly, he explained that “[t]he only person who
12 can change the outcome of a DOT drug test is the [MRO]” but that “[Mr. Spiker’s]
13 noncompliant allegations involving the collector are not sufficient, even if proven, to
14 cancel the DOT positive drug test result.” *Id.* He advised Mr. Spiker to instead consider
15 pursuing civil litigation if he had evidence to support his allegations. *Id.* On May 14,
16 2013, the Office of the General Counsel of the DOT confirmed that Mr. Spiker had
17 exhausted remedies provided by the DOT regulations. (Doc. 29-1, Ex. B.)

18 Because the administrative remedies were inadequate to address the Spikers’
19 negligence claims against Wal-Mart, Mr. Spiker was not required to exhaust them before
20 filing this action. The Spikers may seek relief for Wal-Mart’s alleged negligence in this
21 Court.

22 **IV. WRONGFUL TERMINATION**

23 Wal-Mart asserts that the Spikers’ claims of negligence and negligent training and
24 supervision against it amount to a wrongful termination claim. The Spikers refer to
25 wrongful termination in their SAC and Mr. Spiker’s termination is the alleged harm
26 related to Wal-Mart’s conduct. Accordingly, Wal-Mart argues, the Spikers’ allegations
27 should be considered under the Arizona Employment Protection Act (the “AEPA”) and
28 the requirements to state an AEPA claim under A.R.S. § 23–1501.

1 The Spikers do not base their claims on the circumstances in which Mr. Spiker
 2 was terminated. Instead, they allege that Wal-Mart was negligent in implementing a drug
 3 testing program and in supervising and training its service agents which led to a false
 4 positive drug test and Mr. Spiker's termination. In other words, the Spikers allege that
 5 Mr. Spiker was terminated based on a wrongful drug test and that Wal-Mart's negligent
 6 conduct was the cause of the wrongful drug test. Therefore, the Spikers' negligence
 7 claims against Wal-Mart are just that. To the extent the Spikers allege wrongful
 8 termination in their SAC, (see Doc. 14 ¶ 31), they have disavowed such a claim in their
 9 Response to Wal-Mart's Motion, (Doc. 29 at 21), and it is dismissed without prejudice.

10 **V. NEGLIGENCE**

11 **A. Preemption**

12 The Supremacy Clause provides that the United States Constitution and the laws
 13 promulgated through its procedures are the supreme law of the land. *See* U.S. Const. Art.
 14 VI, cl. 2. Federal law may preempt state law under the Supremacy Clause in three ways:
 15 (1) Congress expressly preempts state law; (2) Congressional intent to preempt is inferred
 16 from the existence of a pervasive federal regulatory scheme; or (3) state law conflicts
 17 with federal law or its purposes. *English v. General Elec. Co.*, 496 U.S. 72, 78–79 (1990).
 18 “[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.”
 19 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). (internal quotation marks and citation
 20 omitted). Federal regulations, such as those at issue here, have the same preemptive effect
 21 as federal statutes. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).
 22 Nevertheless, a presumption against the pre-emption of state police power regulations
 23 applies to state common law tort claims. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504,
 24 518 (1992).

25 **1. Express Preemption**

26 “Because the FOTETA contains an express preemption clause, we focus in the
 27 first instance on the plain language of the statute, because it necessarily contains the best
 28 evidence of Congress' pre-emptive intent.” *Chapman v. Lab One*, 390 F.3d 620, 625 (8th

1 Cir. 2004). The Act and the regulations implementing it contain express preemption
2 clauses. The Act states, in relevant part:

3 A state or local government may not prescribe or continue in effect a law,
4 regulation, standard, or order *that is inconsistent with regulations*
5 *prescribed under this section*. However, a regulation prescribed under this
6 section may not be construed to preempt a State criminal law that imposes
7 sanctions for reckless conduct leading to loss of life, injury, or damage to
property.

8 49 U.S.C. § 31306(g) (emphasis added). The DOT regulations provide:

9 (a) Except as provided in paragraph (b) of this section, this part preempts
10 any State or local law, rule, regulation, or order to the extent that:

11 (1) Compliance with both the State or local requirement in this part
12 is not possible; or

13 (2) Compliance with the State or local requirement is an obstacle to
14 the accomplishment and execution of any requirement in this part.

15 (b) This part shall not be construed to preempt provisions of State criminal
16 law that impose sanctions for reckless conduct leading to actual loss of life,
17 injury, or damage to property, whether the provisions apply specifically to
transportation employees, employers, or the general public.

18 49 C.F.R. § 382.109 (emphasis added). The Secretary of Transportation has stated that
19 “the purpose of preemption is to avoid the confusion and expense of inconsistent
20 requirements for employers or testing entities that operate in several States and to prevent
21 interference with the functioning of the Federal program by extraneous, burdensome
22 requirements that may defeat its purpose and benefits by making effective
23 implementation difficult or impossible.” *Rector v. LabOne, Inc.*, 208 F. Supp. 2d 987,
24 992 (E.D. Ark. 2002) (quoting *Limitation on Alcohol Use by Transportation Workers*, 59
25 Fed. Reg. 7302, 7317 (Feb. 15, 1994)). “[A] party claiming preemption under this statute
26 has the burden of demonstrating that the putatively preempted law is ‘inconsistent’ with
27 the federal regulations.” *Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1132, *opinion*
28 *amended on denial of reh’g*, 350 F.3d 915 (9th Cir. 2003).

1 The Spikers assert claims of negligence and negligent training and supervision
2 against Wal-Mart. They contend that Wal-Mart breached its duty to exercise reasonable
3 care during the process of implementing and administering a drug testing program,
4 collecting urine samples, preserving a valid chain of custody, and/or otherwise ensuring
5 accurate drug test results. Further, the Spikers allege that Wal-Mart breached its duty to
6 exercise reasonable care during the course of training and supervising BMC and its
7 employees, and ensuring that those employees were properly credentialed in accordance
8 with the DOT regulations. In its Response to Wal-Mart's Motion, the Spikers maintain
9 that their claims "arise entirely out of negligence by Wal-Mart during the selection,
10 training, and supervision of its collection site, BMC."³ (Doc. 29 at 21.)

11 The Ninth Circuit has not addressed whether a state law tort claim brought against
12 an employer based on a drug test conducted by a third party is preempted by the
13 FOTETA.⁴ The issue then is whether the Spikers' negligence claims against Wal-Mart
14

15 ³ The Spikers contend that they are "merely seeking to hold Wal-Mart and the
16 other Defendants accountable for their negligent failure to comply with specific federal
17 regulations." (Doc. 29 at 20.) But looking "only at the face of the Complaint", *Van*
18 *Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002), the Spikers
19 bring claims against Wal-Mart for negligence in conducting the drug testing process and
for negligent selection, training, and supervision of the service agents that conducted the
drug testing. Thus, the Court will not interpret the Spikers' request as one for "relief
under state law for [Wal-Mart's] alleged violations of federal regulations." *Drake*, 458
F.3d at 65.

20 ⁴ In suits maintained against laboratories conducting drug tests, the Ninth Circuit
21 and other jurisdictions have held that negligence claims are not preempted. *See, e.g.,*
22 *Ishikawa*, 343 F.3d at 1133-34; *Chapman*, 390 F.3d at 627; *cf. Drake v. Lab. Corp. of*
23 *Am. Holdings*, 458 F.3d 48, 65 (2d Cir. 2006) (preempting claims based on substantive
24 state common law standards but not claims requesting state law remedies for violations of
25 federal law). In *Ishikawa*, an airline employee brought a negligence claim against a drug
26 test laboratory for negligently handling her test specimen. 343 F.3d at 1130. The Ninth
27 Circuit held that the FOTETA did not preempt the claim because its anti-waiver
28 provision provides that "[t]he employee may not be required to waive liability with
respect to negligence on the part of any person participating in the collection, handling, or
analysis of the specimen." *Id.* at 1133 (citing 49 C.F.R. § 40.25(f)(22)(ii) (1998)). The
court reasoned that "[n]egligence is a state common law tort, and it would make no sense
for the regulation to prohibit requiring the employee to waive negligence claims if those
claims were preempted and could not be made. This [anti-waiver provision] implies that
such claims exist and are not preempted." *Id.* The court did not find implied preemption
because "[d]espite the sensitivity and federal concern with urine testing, The
common law duty to exercise reasonable care to avoid harming people by negligence
applies [to such testing]." *Id.* at 1134.

1 seek to impose standards inconsistent with the DOT regulations or serve as an obstacle to
 2 the accomplishment and execution of their requirements. *See* 49 U.S.C. §§ 382.109(a)(2),
 3 31306(g). The Spikers' claims are based on a theory that Wal-Mart was negligent in
 4 implementing and administering its drug testing program and in selecting, training, and
 5 supervising the specimen collection site, BMC, and its employees. The DOT regulations
 6 state that "[e]ach employer shall ensure that all alcohol or controlled substances testing
 7 conducted under this part complies with the procedures set forth in [Part 40]." *Id.* §
 8 382.105. The regulations, however, "expressly contemplate[] employer delegation of
 9 responsibility for many aspects of testing." *Carroll v. Fed. Exp. Corp.*, 113 F.3d 163, 166
 10 (9th Cir. 1997).⁵

11 In that regard, an employer may discharge its responsibilities for ensuring its drug
 12 testing program comports with the regulations either by (1) administering its own
 13 program within the guidelines of 49 C.F.R. § 40 or (2) hiring qualified service agents to
 14

15 The anti-waiver provision central to the Ninth Circuit's preemption analysis in
 16 *Ishikawa* did not apply to an employer that delegates the drug testing process to a third
 17 party. The provision applied to "negligence on the part of any person *participating in* the
 18 collection, handling, or analysis of the specimen." *Id.* at 1133 (internal citation omitted)
 19 (emphasis added). In 2001, the DOT amended the regulations to state that an employer
 20 could not require a waiver of liability "with respect to any part of the drug or alcohol
 21 testing process (including, but not limited to, collections, laboratory testing, MRO and
 22 SAP services)." 49 C.F.R. § 40.27. That provision, however, was enacted "to ensure that
 23 an employer, acting on behalf of a service agent, could not require such a waiver." *Chapman*,
 24 390 F.3d at 627. The *Chapman* court further noted that another court "had not
 25 take[n] into account the anti-waiver provision" in its analysis because that case involved
 26 an action against an employer and the provision "is directed to negligence on the part of
 27 others involved in the collection, handling, and analysis of specimens." *Id.* at 628
 28 (emphasis added). Wal-Mart was not "involved in the process of collection and analysis",
id. at 627; the Spikers allege that BMC and eScreen conducted the drug test and reported
 the results to Wal-Mart. Thus the reasoning in *Ishikawa*, also followed by *Chapman*, that
 negligence claims are not preempted because of the anti-waiver provision, is inapposite
 as to the Spikers' claims against Wal-Mart.

⁵ In *Carroll*, the Ninth Circuit noted that under the regulations, an employer bears
 responsibility, inter alia, for the following: maintaining records for purposes of inspection
 by the Federal Highway Administrator, 49 C.F.R. § 382.401; testing a minimum annual
 percentage of drivers, *id.* § 382.305; testing a driver when the employer has reasonable
 suspicion he or she has violated the prohibitions on controlled substances, *id.* § 382.307;
 and testing driver-applicants before hiring or using them, *id.* § 382.301. 113 F.3d at 166
 n.2. (citing to prior versions of these provisions).

1 perform testing, see *id.* § 40.15. *Carroll*, 113 F.3d at 166 n.2 (citing to prior versions of
2 these provisions). In 2001, the DOT revised Part 40 and added provisions regarding an
3 employer's responsibility to ensure that its service agents comply with the regulations.
4 Section 40.11 states that an employer is "responsible for all actions of [its] officials,
5 representatives, and agents (including service agents) in carrying out the requirements of
6 the DOT agency regulations." Further, the revised Part 40 states that an employer is
7 "responsible for ensuring that the service agents [it] uses meet the qualifications set forth
8 in this part (e.g., § 40.121 for MROs)." 49 C.F.R. § 40.15(b). It goes on to state that "[an
9 employer] remain[s] responsible for compliance with all applicable requirements of this
10 part and other DOT drug and alcohol testing regulations, even when [it] use[s] a service
11 agent." *Id.* § 40.15(c). But before publishing the revisions, the Secretary clarified that the
12 new provisions do not require employers "to have active monitoring responsibilities with
13 respect to service agents, though employers may choose to monitor their service agents'
14 performance." Dept. of Transp., *Procedures for Transp. Workplace Drug and Alcohol*
15 *Testing Programs*, 65 FR 79462-01 at 79484 (December 19, 2000). Rather, employers
16 are required "simply to make sure that service agents meet regulatory qualifications. To
17 this end, employers may ask to see documentation from service agents, who are obligated
18 to provide it." *Id.*

19 Requiring an employer, through common law tort liability, to supervise and train
20 service agents would thus be inconsistent with the DOT regulations. Further, the
21 regulations set out a remedial process if a service agent does not comply with the same in
22 which the DOT may impose sanctions on the employer. 49 C.F.R. § 40.15(c). "State law
23 cannot 'enlarg[e] or enhanc[e]' the regulations to impose burdens more onerous than
24 those of the federal requirements on matters addressed by the federal regulations." *Drake*,
25 458 F.3d at 65 (quoting *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995))
26 (preempting claims asserting that conduct addressed by drug testing regulations was
27 "wrongful" under state law though that conduct did not violate the regulations). Wal-
28 Mart hired service agents to administer and conduct its drug testing program. To the

1 extent the Spikers seek to hold Wal-Mart liable for negligent supervision and training of
2 those agents, such claims are expressly preempted by the FOTETA and dismissed with
3 prejudice.

4 The Spikers also allege that Wal-Mart was negligent in failing to ensure that BMC
5 was credentialed in accordance with the DOT regulations. As an employer, Wal-Mart is
6 required to “ensur[e] that the service agents [it] uses meet the qualifications set forth in
7 [the regulations].” 49 C.F.R. § 40.15(b). Wal-Mart acknowledges that it is obliged “to
8 choose accredited service agents.” (Doc. 37 at 5.) Therefore, the Spikers’ claim that Wal-
9 Mart was negligent in fulfilling that requirement is not inconsistent with the regulations.
10 That claim is not expressly preempted by the FOTETA.

11 **2. Implied Preemption**

12 Wal-Mart asserts that the Spikers’ claims are preempted due to extensive federal
13 regulation in the arena of drug testing of transportation employees. “[P]reemption may be
14 inferred when federal regulation in a particular field is so pervasive as to make reasonable
15 the inference that Congress left no room for the States to supplement it. In such cases of
16 field preemption, the mere volume and complexity of federal regulations demonstrate an
17 implicit congressional intent to displace all state law.” *Aguayo v. U.S. Bank*, 653 F.3d
18 912, 918 (9th Cir. 2011) *cert. denied*, 133 S. Ct. 106, 184 L. Ed. 2d 23 (2012) (internal
19 quotation marks and citation omitted). In its Motion, Wal-Mart largely argues for implied
20 preemption regarding the Spikers’ claim that Wal-Mart was negligent in training and
21 supervising BMC. (*See* Doc. 21 at 6–10.) But as stated above, those claims are expressly
22 preempted by the FOTETA. The remaining claim against Wal-Mart is that it was
23 negligent in verifying that BMC was qualified to serve as a drug testing agent.

24 “[O]rdinarily when Congress has considered the issue of pre-emption and has
25 included in the enacted legislation a provision explicitly addressing that issue, and when
26 the provision provides a reliable indicium of congressional intent with respect to state
27 authority there is no need to infer congressional intent to pre-empt state laws from the
28 substantive provisions of the legislation.” *Ishikawa*, 343 F.3d at 1133 (internal alterations

and citation omitted). In *Ishikawa*, the Ninth Circuit stated that the FOTETA’s provision that expressly preempts state laws inconsistent with the Act, 49 U.S.C. § 31306(g), “impl[ies] that Congress intentionally did not preempt state law generally.” *Id.* (internal citation. *Id.* Accordingly, the court held that the “common law duty to exercise reasonable care to avoid harming people by negligence applies” to drug testing of employees unless the imposition of such a duty is inconsistent with the FOTETA. Although *Ishikawa* involved the FAA’s implementing regulations, the same rationale applies to the DOT regulations at issue here. Therefore, there is no implied preemption of the Spikers’ claim that Wal-Mart was negligent in ensuring that BMC was a qualified service agent.^{6 7}

B. PRIMA FACIE CASE

Defendants BMC and Padilla, Dr. Kracht, and eScreen move to dismiss the Spikers’ negligence claims against them. In Arizona, a plaintiff must prove four elements to state a prima facie case for negligence: “(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual damages.” *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007) (internal citations omitted). The existence of a duty is a matter of law for the Court’s determination. *Id.* (internal citations omitted). The other elements, including breach and causation, are factual issues usually decided by the jury. *Id.* (internal citations omitted).

1. Duty

“Whether the defendant owes the plaintiff a duty of care is a threshold issue;

⁶ In its Reply, Wal-Mart also argues that the Spikers’ claims are preempted by the AEPA, A.R.S. § 23–2501, *et seq.* But the Court need not consider that argument because it was not made in the Motion. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008) (“Arguments raised for the first time in [the] reply brief are deemed waived.”).

⁷ Wal-Mart contends, in its Reply, that to the extent the Spikers claim reputational damages against Wal-Mart based on the positive drug test result, that claim is preempted by the DOT regulations. The Court also declines to consider that contention because it was not included in the Motion.

1 absent some duty, an action for negligence cannot be maintained.” *Id.* (internal citations
2 omitted). Whether a duty exists is a matter of law for the Court to decide. *Lips v.*
3 *Scottsdale Healthcare Corp.*, 224 Ariz. 266, 268, 229 P.3d 1008, 1010 (2010). If the
4 Court holds that no duty exists, “the defendant is not liable even though he may have
5 acted negligently in light of the foreseeable risks.” *Markowitz v. Arizona Parks Bd.*, 146
6 Ariz. 352, 356, 706 P.2d 364, 368 (1985); *see Gipson*, 214 Ariz. at 143–44. In
7 determining the whether a duty exists, “the question is whether the relationship of the
8 parties was such that the defendant was under an obligation to use some care to avoid or
9 prevent injury to the plaintiff.” *Markowitz*, 146 Ariz. at 356.

10 The Arizona Supreme Court has held that a duty of care may arise from, among
11 other sources, special relationships based on contract, family relations, or conduct
12 undertaken by the defendant, public policy to prevent future harm, or the existence of a
13 statute criminalizing conduct. *Gipson*, 214 Ariz. at 145–46 (internal citations omitted).
14 Foreseeability of harm, however, is not a factor to be considered when making
15 determinations of duty. *Id.* at 144; *Ritchie v. Krasner*, 221 Ariz. 288, 298, 211 P.3d 1272,
16 1282 (Ct. App. 2009). In determining the existence of a duty, “the requirement of a
17 formalized relationship between the parties has been quietly eroding” in Arizona. *Stanley*
18 *v. McCarver*, 208 Ariz. 219, 221–22, 92 P.3d 849, 851–52 (2004) (internal citations
19 omitted). “When public policy has supported the existence of a legal obligation, courts
20 have imposed duties for the protection of persons with whom no preexisting relationship
21 existed.” *Id.* In addition, courts may consider “the reasonable expectations of parties and
22 society generally, the proliferation of claims, the likelihood of unlimited or insurer-like
23 liability, disproportionate risk and reparation allocation, and public policies affecting the
24 expansion or limitation of new channels of liability.” *Wertheim v. Pima Cnty.*, 211 Ariz.
25 422, 427, 122 P.3d 1, 6 (Ct. App. 2005) (internal citations omitted).

26 Whether service agents, such as collectors and their employees, MROs, and third-
27 party administrators, owe a duty of care to an employee whose specimen they collect and
28 test at the request of an employer is an issue of first impression in Arizona. “In the

1 absence of controlling forum state law, a federal court sitting in diversity must use its
 2 own best judgment in predicting how the state's highest court would decide the case."
 3 *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980) (internal
 4 citations omitted). "In so doing, a federal court may be aided by looking to well-reasoned
 5 decisions from other jurisdictions." (*Id.*) (internal citations omitted). While Arizona
 6 courts "are not bound by the law as announced in other jurisdictions, [they] may look to
 7 those jurisdictions for guidance on this issue." *State v. Emerson*, 171 Ariz. 569, 571, 832
 8 P.2d 222, 224 (Ct. App. 1992); *Shulansky v. Michaels*, 14 Ariz. 402, 405, 484 P.2d 14, 17
 9 (Ct. App. 1971) ("[The court] may therefore look to decisions from sister states in search
 10 of commonlaw rules.") (internal citations omitted). The Court will analyze the existence
 11 of a duty of reasonable care in relation to each type of service agent in turn.

12 **i. BMC and Padilla**

13 In their Motion, BMC and Padilla do not challenge the existence of a duty of care
 14 to Mr. Spiker. The existence of a duty, however, must be determined prior to addressing
 15 the question of whether there was a breach of that duty causing the alleged harm.
 16 Therefore, the Court considers whether BMC and Padilla owed a duty of care to Mr.
 17 Spiker.

18 Upon receiving a specimen from an employee, a collector prepares the specimen
 19 for testing and completes a CCF to record the chain of custody until the specimen is sent
 20 to a laboratory for testing. *See generally* 49 C.F.R. §§ 40.41–40.73. Arizona courts have
 21 not addressed whether a collector owes a duty to an employee whose specimen it
 22 prepares. But other jurisdictions recognize a duty of care that extends either from a
 23 collector or laboratory to an employee even if that service agent performs its role at the
 24 request of an employer. *See Cooper v. Lab. Corp. of Am. Holdings, Inc.*, 150 F.3d 376,
 25 379 (4th Cir. 1998) (collecting cases); *Santiago v. Greyhound Lines, Inc.*, 956 F. Supp.
 26 144, 152 (N.D.N.Y. 1997); *Quisenberry v. Compass Vision, Inc.*, 618 F. Supp. 2d 1223,
 27 1228–31 (S.D. Cal. 2007); *Chapman v. Labone*, 460 F. Supp. 2d 989, 1001 (S.D. Iowa
 28 2006). *But see, e.g., Tricoski v. Laboratory Corp. of Amer.*, 216 F. Supp. 2d 444, 445–46

1 (E.D. Pa. 2002); *Ney v. Axelrod*, 723 A.2d 719, 722 (Pa. Super. Ct. 1999).

2 The rationale in cases that hold that a laboratory owes a duty of care to an
3 employee is germane to the issue of whether a collector owes a similar duty. Both
4 collectors and testers are required to ensure the integrity and accuracy of the drug testing
5 process and must be qualified to do so. *See* 49 C.F.R. §§ 40.31, 40.81. In *Ishikawa*, an
6 employee alleged that a laboratory's negligence in conducting her drug test led to her
7 termination. 343 F.3d at 1130–31. Importantly, after holding that the employee's
8 negligence claim was not preempted, the Ninth Circuit noted that the “common law duty
9 to exercise reasonable care to avoid harming people by negligence” applied to a
10 laboratory's testing and reporting of results related to an employee's specimen. *Id.* at
11 1134. Along with authorities in other jurisdictions, *Ishikawa* demonstrates that in Arizona
12 a collector owes a duty of care to an employee whose specimen it prepares.

13 Arizona courts consider the state's public policy to prevent future harm in
14 determining whether a duty of care exists. *Gipson*, 214 Ariz. at 145 (citing *Stanley*, 208
15 Ariz. at 221). Public policy warrants the imposition of a duty on collectors to prepare
16 specimens with reasonable care. There is great risk of harm to an employee from a
17 specimen that is prepared in a negligent manner. *See Elliott v. Lab. Specialists, Inc.*, 588
18 So.2d 175, 176 (La. Ct. App. 1991) (finding that the “risk of harm in our society to an
19 individual because of a false-positive drug test is so significant that any individual
20 wrongfully accused of drug usage by his employer is within the scope of protection under
21 the law”). As is the case for Mr. Spiker, an employee may be terminated if there is a false
22 positive drug test report. The employee may also be significantly hindered in his or her
23 efforts to find other employment because of the report. Further, a collector is in a better
24 position “to guard against the injury” as it is solely responsible for the preparation of
25 specimens. *See Stinson v. Physicians Immediate Care, Ltd.*, 269 Ill. App. 3d 659, 664–65
26 (Ill. Ct. App. 1995) (applying that rationale to a laboratory's position in the process). In
27 addition, the collector, which is compensated for preparing the specimens, “is better able
28 to bear the burden financially than the individual wrongly maligned by a false positive

1 report.” *Id.*

2 If there was no duty of care imposed on a collector, numerous employees would
3 be left without an opportunity to redress a drug test based on a negligently prepared
4 specimen and the severe consequences for employees from a false positive report
5 resulting from such a test. Importantly, the DOT regulations contemplate the existence of
6 claims brought by employees against service agents such as collectors. Employers and
7 service agents are prohibited from requiring an employee “to sign a consent, release,
8 waiver of liability, or indemnification agreement with respect to any part of the drug or
9 alcohol testing process covered by this part (including, but not limited to, collections,
10 laboratory testing, MRO, and SAP services).” 49 C.F.R. §§ 40.27, 40.355(a). Thus,
11 public policy supports holding a collector “accountable to the individuals whose
12 specimens it [collects].” *Quisenberry*, 618 F. Supp. 2d at 1230 (internal citation omitted).

13 **ii. Dr. Kracht**

14 As an MRO for eScreen, Dr. Kracht was responsible for reviewing Mr. Spiker’s
15 specimen. Under the DOT regulations, an MRO provides a quality assurance review of
16 the drug testing process for the specimens under the MRO’s purview. 49 C.F.R. §
17 40.123(b). In that role, an MRO evaluates the CCF for each specimen to determine
18 whether there is a flaw that may cause a test to be cancelled, determines whether there is
19 a legitimate medical explanation for confirmed positive drug test results, and provides
20 feedback to employers, collection sites and laboratories regarding performance issues
21 where necessary. *Id.* § 40.123(b)(1)–(2), (c).

22 Dr. Kracht contends that he did not owe a duty of care to Mr. Spiker because in
23 reviewing Mr. Spiker’s positive drug test, he acted for the benefit of Mr. Spiker’s
24 employer, Wal-Mart, and not for benefit of Mr. Spiker. In support, Dr. Kracht relies on
25 *Hafner v. Beck*, 185 Ariz. 389, 916 P.2d 1105 (Ct. App. 1995), in which the plaintiff
26 brought a negligence claim against a psychologist that conducted an independent medical
27 examination of the plaintiff on behalf of his employer’s workers’ compensation carrier.
28 The court held that the psychologist did not owe the plaintiff a duty of care because “a

1 medical malpractice suit such as this will lie only when there was a doctor/patient
2 relationship creating a duty to act for the patient's benefit." *Id.* at 391. In *Diggs v.*
3 *Arizona Cardiologists, Ltd.*, however, the Arizona Court of Appeals characterized the
4 holding in *Hafner* as on the "narrow basis" that "a doctor who conducts an independent
5 medical examination and does not 'intend to treat, care for or otherwise benefit the
6 employee' has no duty to that person." 198 Ariz. 198, 201, 8 P.3d 386, 389 (Ct. App.
7 2000) (quoting *Hafner*, 185 Ariz. at 392). The Court further noted that *Hafner* "states that
8 because the defendant rendered no treatment, the relationship between the parties was so
9 attenuated that, for policy reasons, the plaintiff was not entitled to protection." *Id.*

10 *Hafner* is inapposite in these circumstances. This case involves a termination
11 based on a drug test that the Spikers claim was negligently reviewed by the MRO
12 assigned with the responsibility to verify drug test results. Under the federal regulations,
13 an MRO such as Dr. Kracht is to "act[] as an independent and impartial 'gatekeeper' and
14 advocate for the accuracy and integrity of the drug testing process." 49 C.F.R. §
15 40.123(a). The MRO provides a conclusive check by validating all drug test results that
16 he or she receives from the laboratory. In fact, an employer may not remove an employee
17 from the performance of safety-sensitive functions until the MRO has completed
18 verification of a positive drug test result. One of the reasons for requiring such
19 verification is to avoid the "unfair stigmatization of an employee as a drug user." Dep. of
20 Transp., *Procedures for Transp. Workplace Drug and Alcohol Testing Programs*, 65 FR
21 79462-01 at 79463. In mandating MRO review, the Secretary attempts to reach a
22 "regulatory balance between safety interests and the protection of employees from unfair
23 consequences of the process." *Id.* at 79464. Thus, the MRO review process is in part for
24 the benefit for the employee.

25 Even if it was not, there is a relationship between the MRO and an employee
26 whose specimen the MRO reviews entitling the employee to protection under the law.
27 Further, the Court has determined that a collection site owes a duty to an employee; there
28 is no reason to distinguish a MRO that verifies a drug test based on the specimen from

1 the site that collects the specimen. Both types of service agents play a vital role in
2 ensuring that test results are reported accurately to employers as such results are “often a
3 pre-requisite to being hired, promoted, or even continuously employed.” *Quisenberry*,
4 618 F. Supp. 2d at 1230 (noting that in cases of inaccurate reporting, “[e]mployees can
5 lose their jobs, and job applicants can miss out on an opportunity to be considered for a
6 new position or a well-deserved promotion.”). Therefore, the Court concludes that an
7 MRO owes a duty of care to an employee whose specimen the MRO reviews.

8 **iii. eScreen**

9 The Spikers assert that as a TPA of Wal-Mart’s drug testing program, eScreen was
10 responsible for selecting, hiring, training, and/or supervising the site that collected the
11 drug test specimens from employees, and the MROs that verified drug test results. The
12 Spikers seek to hold eScreen primarily liable for failing to ensure that BMC and its
13 employees were properly credentialed and trained pursuant to the DOT regulations and
14 vicariously liable for Dr. Kracht’s allegedly negligent review and verification of the drug
15 test results.

16 eScreen contends that any duty of care in selecting a collector that employed
17 personnel who were properly credentialed and trained ran only to Wal-Mart and not Mr.
18 Spiker. In administering the drug testing program on behalf of an employer, a TPA plays
19 a critical role in ensuring that the service agents that conduct the tests comply with the
20 DOT regulations. The regulations themselves do not make distinctions among service
21 agents and state that “[a]s a service agent, the services you provide to transportation
22 employers must meet the requirements of . . . the DOT agency drug and alcohol testing
23 regulations.” 49 C.F.R. § 40.341. As discussed above, there are sufficient reasons to
24 hold service agents accountable to employees for proper drug testing even if they are
25 serving employers. Thus, taking the allegations in the SAC as true, the Court holds that
26 eScreen owed a duty of care to Mr. Spiker.

27 ///

28 ///

2. Breach

i. Standard of Care

“[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” Restatement § 282. Even if a person owes a duty of care to another, it is a distinct issue whether the standard of reasonable care has been met in a particular case. That standard has been defined as “[w]hat the defendant must do, or must not do . . . to satisfy the duty.” *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007) (internal citations omitted). Whether the defendant has met the standard, or in other words, whether there has been a breach of duty, is an issue of fact determined by the specifics of the individual case. *Id.* The Court may, however, “rule as a matter of law when no reasonable juror could conclude that the standard of care was breached” *Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, 216 Ariz. 454, 458, 167 P.3d 711, 715 (Ct. App. 2007) (internal quotation marks and citations omitted).

The standard of reasonable care may be established by (1) statute or regulation; (2) adopted by the Court from a statute or regulation; (3) established by judicial decision; or (4) applied to the facts of the case. Restatement § 285. Here, the conduct of service agents is governed by the FOTETA and DOT regulations. The Restatement states that a court may adopt as the standard of care the requirements of a statute or regulation whose purpose is exclusively or in part:

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

Restatement § 286; *see Tellez v. Saban*, 188 Ariz. 165, 169, 933 P.2d 1233, 1237 (Ct. App. 1996) (citing the Restatement elements). The purpose of a statute may be

1 determined by reference to its title, preamble, detailed provisions, or history, among other
2 sources. Restatement § 286 cmt. f. The express purpose of the FOTETA is “to establish
3 programs designed to help prevent accidents and injuries resulting from the misuse of
4 alcohol or use of controlled substances by drivers of commercial motor vehicles.” 49
5 C.F.R. § 382.101. Further, the implementing regulations were prescribed by the DOT
6 “[i]n the interest of commercial motor vehicle safety.” *Id.* § 31306(b). As discussed
7 above, the regulations aim to achieve a regulatory balance between safety interests and
8 the protection of employees. The purpose of the regulations, however, is to protect the
9 public at large and not to protect employees such as Mr. Spiker who are tested according
10 to the requirements set out therein. The regulations do not set out the minimum standard
11 of care to determine whether there has been a breach of the duty of care owed to an
12 employee. *See Drake*, 458 F.3d at 57 (“Although they set out elaborate rules for
13 conducting drug tests, the DOT regulations do not specifically address negligence on the
14 part of drug-testing laboratories or otherwise establish the minimum standard of care to
15 be exercised by laboratory personnel.”).

16 Service agents generally “owe[] a duty of reasonable care to persons whose
17 specimens [they] test[] for employers or prospective employers.” *Stinson v. Physicians*
18 *Immediate Care, Ltd.*, 269 Ill. App. 3d 659, 665 (1995); *see Ishikawa*, 343 F.3d at 1134
19 (noting that “the “common law duty to exercise reasonable care to avoid harming people
20 by negligence” applies to service agents). Further, for those with special skills or training,
21 the standard of care imposes “the higher obligation to act in light of that skill, training, or
22 knowledge.” *Stanley*, 208 Ariz. at 224. The DOT regulations state that service agents
23 must ensure “the services [they] provide to transportation employers . . . meet the
24 requirements of this part and the DOT agency drug and alcohol testing regulations.” 49
25 C.F.R. § 40.341. The regulations also require service agents to be qualified and their
26 personnel to meet training requirements as outlined therein. *See, e.g., id* §§ 40.33
27 (collector), 40.41 (collection sites), 40.121 (MRO). Thus, service agents must act with
28 reasonable care in light of that training when conducting drug tests. Although the DOT

1 regulations do not set out the minimum standard of care and a violation of their
 2 requirements is not negligence per se, the regulations provide guidance as to the standard
 3 of reasonable care.

4 **ii. BMC and Padilla**

5 In their SAC, the Spikers allege that BMC and Padilla failed “to ensure that Mr.
 6 Spiker’s sample was validly collected, labeled, stored, shipped, and/or tested.” (Doc. 14 ¶
 7 36.) The factual allegations are (1) that Padilla did not place a tamper-evident seal onto
 8 Mr. Spiker’s specimen bottle before Mr. Spiker initialed it as required by Section 40.71,
 9 (*id.* ¶ 37), and (2) that Padilla was not properly credentialed and trained as collectors as
 10 required by Section 40.33, (*id.* ¶¶ 38, 75–77).

11 BMC and Padilla contend that the Spikers’ allegation that Padilla affixed the seal
 12 after Mr. Spiker initialed it is controverted by Mr. Spiker’s certification on a CCF.
 13 Defendants attach that CCF to their Motion. The certification on the signed CCF by Mr.
 14 Spiker states: “I certify that each specimen bottle used was sealed with a tamper-evident
 15 seal in my presence.” (Doc. 20-1, Ex. 1.) Even if the Court were to consider the CCF on a
 16 motion to dismiss, Mr. Spiker’s certification directly contradicts the Spikers’ allegation in
 17 the SAC that Padilla affixed the seal on the specimen after Mr. Spiker initialed it. Further,
 18 the SAC can be read to allege that regardless of the CCF certification, the seals were not
 19 affixed in Mr. Spiker’s presence. These factual disputes are not properly determined at
 20 this stage of the proceedings.

21 BMC and Padilla contend that even if Padilla did not follow the mandated
 22 procedure, the labeling and sealing were “substantially correct” so that her deviation does
 23 not amount to a breach. Defendants assert that incorrect sealing is a mere “procedural
 24 error” and is not one of the four “fatal flaws” the DOT regulations list that require a drug
 25 test to be cancelled. *See* 40 C.F.R. § 40.199.⁸ Although the regulations are not dispositive

26 ⁸ The following are the fatal flaws:

- 27 (1) There is no printed collector’s name and no collector’s signature;
 28 (2) The specimen ID numbers on the specimen bottle and the CCF do not

as to what conduct constitutes a breach, they are persuasive as to reasonable behavior in this highly regulated area of drug testing. A drug test is not cancelled even if the employee does not initial the tamper-evident seals at all; rather, the collector is required to note this failure to initial in the “Remarks” line of the CCF and complete the collection process. *Id.* § 40.71. The proper sealing of a specimen, however, is essential to the chain of custody process that ensures the integrity of the specimen. *See* § 40.199(3) (stating that one of the fatal flaws is a broken specimen bottle seal or evidence of tampering with the seal). The collector is held to the higher obligation to act in light of mandated training to properly seal drug test specimens. Further, the CCF requires the collector to attest to the fact that the specimen was sealed in accordance with the DOT regulations. (*See* Doc. 20-1, Ex. 1.) If there is no such attestation, the test is cancelled by the MRO. *Id.* § 40.199(1). Because proper sealing procedure is important to maintain a reliable chain of custody and incorrect sealing is alleged in the SAC, the alleged facts thus state a breach of the duty of reasonable care.

The Spikers also allege that Padilla was not properly credentialed and trained as a collector as required by the DOT regulations. Only collectors that meet the training requirements set out in the regulations are authorized to collect specimens for DOT drug testing. *Id.* § 40.31(a)–(b). Section 40.33 lists several training requirements for collectors including qualification training, an initial proficiency demonstration, refresher training, error correction training, and documentation. In light of the public policy embodied in the

match;

(3) The specimen bottle seal is broken or shows evidence of tampering (and a split specimen cannot be redesignated, see § 40.83(g)); and

(4) Because of leakage or other causes, there is an insufficient amount of urine in the primary specimen bottle for analysis and the specimens cannot be redesignated (see § 40.83(g)).

49 C.F.R. § 40.199.

1 regulations to require all collectors to be qualified, Defendants' duty of reasonable care
2 obliges them to comply with those requirements. The SAC alleges facts to make the
3 reasonable inference that Padilla did not comply with the training requirements. For
4 example, the Spikers allege that Padilla did not follow the sealing procedure outlined in
5 the regulations and that she was not properly credentialed and trained when she collected
6 Mr. Spiker's specimen. BMC was allegedly responsible for supervising and training
7 Padilla. Therefore, the Spikers, at this point, have sufficiently alleged that BMC and
8 Padilla breached their duties of care.

9
10 **iii. Dr. Kracht**

11 As discussed above, the MRO serves an important role in ensuring the reliability
12 of the drug testing program. The Spikers allege that Dr. Kracht breached his duty of care
13 by not fulfilling his oversight function under the regulations as to Mr. Spiker's specimen.
14 Assuming Dr. Kracht's duty to Mr. Spiker obligated him to fulfill that function, the
15 Spikers' allegations are conclusory and do not provide factual allegations to draw the
16 inference that Dr. Kracht breached his duty.

17 The Spikers allege that Dr. Kracht (1) "failed to take reasonable steps to execute
18 his duties as MRO and failed to ensure that Mr. Spiker's urine sample was validly
19 collected, labeled, stored, shipped and/or tested", (Doc. 14 ¶ 39); (2) "did not satisfy the
20 required credentials, basic knowledge, training, and responsibilities outlined in the
21 federal regulations", (*id.* ¶ 40); (3) "failed to act as an 'independent and impartial
22 gatekeeper and advocate for the accuracy and integrity of the drug testing process'", (*id.* ¶
23 41) (quoting 49 C.F.R. § 40.123(a)); (4) "failed to properly investigate obvious
24 discrepancies in the chain of custody of Mr. Spiker's urine sample", (*id.* ¶ 64); and (5)
25 "failed to properly investigate obvious problems with the credentials and training of
26 BMC's employees, including Defendant Padilla", (*id.* ¶ 65). But there are no allegations
27 as to how Dr. Kracht failed in these respects. The Spikers do not state how Dr. Kracht
28 lacked the requisite credentials or training and failed his gatekeeping role, what
discrepancies he failed to investigate, or what "obvious problems" he overlooked as to

1 the qualifications of BMC's employees.

2 The only plausible "discrepancy" in the chain of custody to which the Spikers may
3 be referring is the incorrect sealing by Padilla discussed above. But during a quality
4 assurance review of specimens, the MRO is charged only with reviewing the CCF "for
5 the purposes of determining whether there is a problem that may cause a test to be
6 cancelled." 49 C.F.R. § 40.123(b)(1). The Spikers do not allege that Dr. Kracht failed to
7 review the CCF, ignored one of the four fatal flaws that would require a test to be
8 cancelled, or that the CCF was lacking in any respect. Although the regulations do not
9 determine the standard of care, the MRO is their creation. They do not make the MRO
10 responsible for reviewing any and all discrepancies in the chain of custody. Because the
11 Spikers do not allege other facts that Dr. Kracht breached his duty, their negligence claim
12 against him is dismissed with leave to amend.

13 **iv. eScreen**

14 The Spikers allege that eScreen was negligent in selecting, hiring, and training
15 and/or supervising BMC, Padilla, and Dr. Kracht. The Spikers have alleged facts that
16 BMC and Padilla breached their duties of reasonable care through incorrect sealing and
17 lack of training. Because the Spikers also allege that eScreen handled the selection,
18 hiring, training, and/or supervision of BMC, they allege facts that eScreen breached its
19 duty of care to supervise and train BMC and Padilla. As to Dr. Kracht, however, the SAC
20 does not sufficiently allege that he breached his duty of reasonable care; therefore, it does
21 not state a negligence claim against eScreen for its supervision of Dr. Kracht.

22 **3. Causation**

23 Arizona law holds that causation exists "if the defendant's act helped cause the
24 final result and if that result would not have happened without the defendant's act."
25 *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983) (internal citation
26 omitted). Defendant's act need not have been a "large" or "abundant" cause of the final
27 result; there is liability if the result would not have occurred but for defendant's conduct,
28 even if that conduct contributed "only a little" to plaintiff's injuries. *Id.* (internal citation

1 omitted). Plaintiff need only present probable facts from which the causal relationship
2 reasonably may be inferred. *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546,
3 789 P.2d 1040, 1047 (1990) (internal citation omitted).

4 The Spikers allege causation. They allege that Padilla's incorrect sealing and lack
5 of training caused Mr. Spiker's specimens to be contaminated or mistakenly identified,
6 resulting in a false positive drug test. That test led to Mr. Spiker's termination of
7 employment. Further, eScreen's and BMC's alleged failure to properly supervise and
8 train Padilla led to her misconduct. Because the Spikers allege causation, they state a
9 prima facie case for negligence against eScreen, BMC, and Padilla.

10 **VI. OTHER PLEADED CLAIMS**

11 BMC and Padilla contend that the Spikers have not stated claims for defamation
12 and negligent infliction of emotional distress. The Spikers allege in their SAC that
13 "Defendants' negligence also . . . defamed Mr. Spiker's public and professional
14 reputation" and that "Defendants' negligence has caused . . . emotional distress . . ."
15 (Doc. 14 ¶ 53–54.) In their Response, the Spikers state that they do not allege claims for
16 defamation or negligent infliction of emotional distress. Those terms are alleged in the
17 SAC as damages relating to Defendants' negligent conduct and not as separate claims. To
18 the extent the SAC purports to state claims for defamation and negligent infliction of
19 emotional distress, they are dismissed from this action.

20 **CONCLUSION**

21 The FOTETA preempts the Spikers' claims against Wal-Mart for negligent
22 training and supervision but does not preempt their claim that Wal-Mart was negligent in
23 selecting qualified service agents to implement its drug testing program. As to the
24 negligence claims against the service agents, the agents owed a duty of reasonable care to
25 Mr. Spiker. The SAC does not allege that Dr. Kracht breached his duty of care. It does
26 allege that Padilla, eScreen, and BMC, through their deficient supervision and training of
27 Padilla, breached that duty. Padilla did not follow the proper sealing procedure outlined
28 in the DOT regulations and was not trained by eScreen and BMC pursuant to the

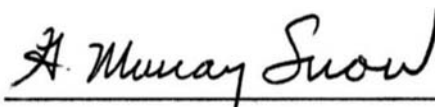
1 regulations. The SAC further alleges that the incorrect sealing and lack of training caused
2 Mr. Spiker's injury, namely, a false positive drug test report and subsequent termination
3 from employment. The Spikers thus state claims of negligence against eScreen, BMC,
4 and Padilla, but not against Dr. Kracht.

5 **IT IS THEREFORE ORDERED** that the Motion to Dismiss of Defendants
6 Stephen Kracht, D.O., and eScreen (Doc. 19) is **granted in part and denied in part**. The
7 claims against Defendant Kracht are dismissed with leave to amend. If Plaintiffs do not
8 move to amend the Second Amended Complaint as to their allegations against Defendant
9 Kracht **within thirty (30) days**, the Clerk of the Court is directed to terminate Defendant
10 Kracht from this action.

11 **IT IS FURTHER ORDERED** that the Motion to Dismiss for Failure to State a
12 Claim of Defendants Buckeye Medical Center and Padilla (Doc. 20) is **denied**.

13 **IT IS FURTHER ORDERED** that the Motion to Dismiss Second Amended
14 Complaint of Wal-Mart (Doc. 21) is **granted in part and denied in part**.

15 Dated this 16th day of September, 2013.

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19 G. Murray Snow
20 United States District Judge
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